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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 550

ROBERT E. FUNKHOUSER, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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Opposition Brief Page No.	INDEX	Reply Brief Page No.

	Answer to Statement in Opposition Brief	
2	Section 145(b) not applicable when no tax had been imposed	2, 3, 4
2	First sentence of Rule 35 contains no presuppositions	14-15
3	Evidence showed no examination of returns to determine any understatements	4-9
3	Determination whether items were properly deductible should have been made in an examination before submission to jury. See. 57, 271, 272, 145(b)	4-9
3	Jury was instructed they could convict before any audit, inquiry or calculation	10
4	Notice of appeal was filed with Court the day sentence was imposed	10
4	When no taxes were imposed no punishment was authorized (Sec. 145(b))	10
4	Error of court taking jurisdiction has been remedied by Congress	15
4	District Court erred in not accepting appeal filed	10
4	Petitioner was argument about jurisdiction from Congress	11-12
5	Precise computation is required by Internal Revenue Code Sec. 57, 271, 272	7-10, 15-16
5	All cases cited by respondent are inapplicable	13-15
5	Penalties imposed by Sec. 145(b) are for taxes imposed by Sec. 57, 271, 272 and the imposition of taxes under those sections require precise computation	15-17
6	The District Court admitted receiving notice of appeal which he refused to file. The cases cited are inapplicable	10

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Respondent's brief in opposition sets out errors in the law, the evidence, and the cases cited.

REPLY TO PAGE TWO OF RESPONDENT'S BRIEF IN OPPOSITION

Respondent quotes Sec. 145(b) of the Internal Revenue Code of 1939 as the law under which this case was prosecuted. That law is not applicable to this case because the section quoted *twice repeats* that the penalties are provided for the *evasion of any tax imposed by this chapter.* No tax had been *imposed.* There had been no examination of the returns, no determination of the correct tax. No determination of

any deficiency in tax. No assessment of any tax. No inquiry about the returns or the items listed in the returns, no notice of any proposed deficiency. No opportunity for the Tax Court of the United States to review or redetermine, or determine if there was any deficiency. No tax was determined, assessed or *imposed*.

The Internal Revenue Code of 1939 sets out in Sections 41, 51, 54, 57, 271, 272 exactly how all taxes are to be imposed by the chapter. (Pet. 5a-8a).[1]

Respondent testified that he found all gross income and all expenses listed in the income tax returns which were filed by petitioner (Pet. 7-8). The returns complied with Sections 41, 51, 54 of the chapter (Pet. 5a-6a).

These returns were not examined by the Commissioner. No tax was imposed (Sec. 57, 271, 272).

Section 57 of the Internal Revenue Code of 1939 provides:

> Sec. 57. As soon as practicable after the return is filed the Commissioner shall examine it and shall determine the correct amount of the tax (Pet. 6a).

Respondent admits, the record shows, and the Courts below admit that there was no examination of the returns: no determination of the correct tax, no deter-

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[1] Reference (Pet.) refers to petition for writ of Certiorari this Court.
Reference (Opposition) refers to respondent's brief in opposition.
Reference (Appl. Br.) refers to petitioner's brief in Appellate Court.
Reference (Trans.) refers to transcript of proceedings in District Court.

mination of any deficiency, no audit, no precise computation, no assessment, no passing upon the claimed deductions (Pet. 2a-3a); no inquiry about the returns, no inquiry about the particular items listed as expenses, no inquiry about the specific checks listed as expenses, no tabulation of the items listed as expenses, no computation of the allowable depreciation, no list of the items, no attempt to analyze the items (Pet. 6-7); and no determination, calculation or imposition of any tax (Sec. 57, 271, 272).

These are the only provisions of the Internal Revenue Code of 1939 for the examination, determination of the correct tax, determination of any deficiency in tax and the *imposition* of any tax.

When no tax was imposed under the provisions of those sections of the Internal Revenue Code no tax was *imposed*, and the provisions of Sec. 145(b) were not applicable.

The Courts below found there was no examination or imposition of any tax and they erred in ruling that the penalties of Sec. 145(b) could be imposed for this prosecution without any examination, assessment or the imposition of any tax.

The Court below said:

a. "Before indictment his return was not audited to determine the exact amount of tax due by him" (Pet. 2a).

b. "There is no requirement for the precise computation and assessment of the tax before there can be a criminal prosecution for fraudulent tax evasion under Sec. 145(b)." (Pet. 3a).

c. "The Commissioner had not, prior to the prosecution passed upon each of 30,000 claimed deductions." (Pet. 3a).

d. The Commissioner made no inqury about the particular items and the specific checks listed in the returns, made no tabulation of the items, made no calculation of the items, made no computation of the items, made no list of the items, made no attempt to analyze the items. (Pet. 7).

The Commissioner made no determination of any deficiency in tax (Sec. 271).

The Commissioner made no assessment or *imposed* no tax under Sec. 272.

The agent testified that he made the charges on the basis:

> "We take the total sum and apply in what in our judgment is a reasonable figure to apply". (Record on Appeal, page 84. Ex. page 56a).

The record shows that the agent just set up some "assumed" figures for the indictment which he admitted at the trial were just *assumed*, and *wrong for three of the five years* (Transcript pages 493-497).

REPLY TO PAGE 3 OF RESPONDENT'S BRIEF IN OPPOSITION WHICH MISQUOTES THE EVIDENCE.

The Record shows by Government testimony:

1. The only examination made by the Government consisted of securing the automobile license number of petitioner's automobile and following that automobile about the roads for a couple of weeks, and then enventorying petitioner's safety deposit box in search of cash (Pet. 6).
2. Respondent testified that thereafter he made no inquiry about the particular items listed as expenses on the returns (Pet. 7).

3. Respondent testified that he made no inquiry about the specific checks listed as expenses (Pet. 7).

4. Respondent testified that he made no tabulation of the items listed as expenses (Pet. 7).

5. Respondent testified that he made no calculation of the items listed as expenses (Pet. 7).

6. Respondent testified that he made no computation of the allowable depreciation (Pet. 7).

7. Respondent testified that he made no list of the items listed as expenses on the returns (Pet. 7).

8. Respondent testified that he made no attempt to analyze the 30,000 listed items of expense (Pet. 7).

9. Respondent testified that he found the expenses listed and itemized and recorded in minute detail (Pet. 8).

10. Respondent made no determination of any tax on which any deficiency, as defined by Sec. 271, could be determined (Pet. 10).

11. Respondent mailed no 90-day letter as required by Sec. 272.

12. Respondent afforded no opportunity for any review by any other official, or any appeal to any other official, or to the Tax Court of the United States (Sec. 272).

13. Respondent ignored Secs. 57, 271, 272, and the Courts below ruled that there was no requirement for determination of the precise tax before this criminal proceeding (Pet. 2a-3a).

14. Respondent and the Courts below proceeded with this prosecution on their theory that no examination or inquiry was necessary and that any assumptions of any agent would suffice for this criminal prosecution, fine and imprisonment (Pet. 2a-3a).

15. Respondent set up the "assumed" figures for the indictment in this case before he made any examination, audit, inquiry, tabulation, calculation, computation, list, or any attempt to analyze the items listed as expenses on the returns (Pet. 7). The indictment figures were only the first of a series of thirteen different "assumed" figures set up by respondent; none or which were based on any examination or determination of a deficiency as defined by Sec. 271 or imposed by Sec. 272. (See Record on Appeal, page 159).

16. Respondent ignored the Statutory requirements of Sections 57, 271, 272 for the legal determination, assessment and imposition of any taxes and his agent testified that he made these charges on a basis discarded over a thousand years ago. He testified:

> "We take the total sum and apply in what in our judgment is a reasonable figure to apply". (See agent's testimony, Record on Appeal, page 84. Ex. page 56a).

17. Respondent testified that for the figures for these taxes he just threw in whole columns of figures without making any inquiry, audit, examination or any attempt to analyze the items, and without knowing why the columns of figures were in there at all. (See Record on Appeal, page 84. Ex. page 56a).

18.—Respondent permitted his agent to prosecute this case with perjury from page 5 of the transcript to page 498 of the transcript.

1. Perjury on page 5 that the laundry had been sold in 1944 which was proved perjury by the testimony of the same agent on page 498.

2. Perjury on page 104 about the contentions as to the use of property which was proved perjury by the testimony of the same agent on pages 393-397.

3. Perjury on page 498 when the agent testified that medical expenses were not permitted by law in 1943. Proved perjury by reference to the Code of 1939.

19. The Court erred in accepting assumptions and perjury in place of evidence of the required examination of the returns and the determination of the correct tax; the determination of a deficiency and the imposition of any tax as required by Sec. 57, 271, 272, 145(b) (Pet. 14).

20. The Court erred in refusing to allow petitioner to present proof, facts and testimony by an expert accountant who had examined the books and records and who had found that no tax was due, owing and evaded (Pet. 14).

21. The Court erred in ruling that the "assumptions", opinions and charges of an agent which the agent admitted were made without any examination, tabulation, calculation, computation or determination of any deficiency could be used as a substitute for the "precise computation", determination and imposition of the tax in this criminal prosecution (Pet. 6, 7, 2a, 3a).

22. The Court below erred in ruling that respondent could prove fraud without his having made any examination, audit, precise computation, inquiry, tabulation, list, attempt to analyze or pass upon the claimed deductions (Pet. 2a, 3a, 14).

23. The Court below erred when it proceeded with this prosecution after it found that 29,800 of the listed items of expense were legally allowable and that only 200 of the items were questioned and the Court found:

> BY THE COURT: "As to many of the items that he has deducted, they were deductible legally, properly if the facts which the defendant relates to you are accepted by you as true." (Pet. 12-22).

24. The Court below erred when it ruled that there was no requirement for the precise computation and assessment of the tax before there can be a criminal prosecution for fraudulent tax evasion under Sec. 145(b) when respondent admitted that all gross income and all expenses were found reported (Pet. 7-8), and 29,800 of the 30,000 listed items were found to be allowable and the other 200 items were not inquired about, tabulated, calculated, listed, computed, analyzed, audited or examined (Pet. 7, 8, 9, 10, 11-23).

25. The Court below erred when it allowed this criminal prosecution to proceed after it found that respondent had allowed 99 34 100% of the listed expenses and was here making these charges of fraud without having made any examination of the returns, without having made any inquiry about the items, without having made any tabulation of the items, without having made

any calculation of the items, without having made any computation of the large depreciation item, without having made any attempt to analyze the items, without having made any determination of any deficiency, without having made any determination of the correct amount of the tax or without having complied with any of the statutory requirements for the determination assessment and imposition of the correct tax. (Pet. 2-22 and Sec. 57, 271, 272).

Any one of those twenty-five items all put into this record by respondent's testimony, shows that this was not a just or proper criminal prosecution. This sentence was based on "assumptions" which had no basis in fact, investigation, examination, or application of the Internal Revenue Laws. (Sec. 57, 271, 272).

The methods described by respondent in his testimony were descarded over a thousand years ago as legal methods of imposing taxes. (Pet. 2-22 and 2a-4a).

The Internal Revenue Code of 1939 sets out very definitely the requirements for the precise determination of the correct tax, and exactly how the tax is to be determined and imposed. (Sec. 57, 271, 272). No tax was determined or imposed here.

The penalties of Sec. 145(b) cannot be legally applied until the tax has been *imposed* in accordance with the chapter (Sec. 57, 271, 272). A precise computation is required. Any "assumption", conjecture, guess or charge by any agent, court or jury unjustly deprived petitioner of his constitutional rights.

The ruling of the Court below that the Government did prove false claims for deductions when the Government admitted not having made any audit to determine the *exact amount* of any tax due; without the *precise computation* and assessment of the tax; without *passing upon each of the claimed deductions*, deprived this petitioner of his constitutional rights, his property, and his liberty. (Pet. 2a-3a).

Without having made any examination, determined the correct amount of the tax, or made any inquiry, tabulation, audit, calculation, list, computed the depreciation allowable, made any attempt to analyze the items, determined any deficiency and *imposed* any tax, respondent had no facts on which to prosecute any fraud charge in any court. (Pet. 2-22 and 2a-8a).

REPLY TO PAGE 4 OF RESPONDENT'S BRIEF IN OPPOSITION WHICH DOES NOT STATE ALL OF THE FACTS ABOUT PETITIONER'S EFFORT TO APPEAL THIS CASE.

The record shows that the District Court admitted receiving petitioner's notice of appeal within a few hours after sentence was pronounced (Appeals Br. 18-23).

REPLY TO PAGE 4 OF RESPONDENT'S BRIEF IN OPPOSITION WHICH ERRS IN TRYING TO JUSTIFY THE SENTENCE BY SAYING THAT THE SENTENCE WAS MUCH LESS THAN THE PUNISHMENT AUTHORIZED BY AN INAPPLICABLE LAW. Sec. 145(b).

Respondent cannot justify the sentence by stating that the sentence was much less than the punishment authorized by Sec. 145(b) for the evasion of taxes *imposed* by the chapter. No taxes were *imposed* by the chapter in this case. The returns were not examined, the correct amount of the tax was not determined, there was no determination of any deficiency,

no taxes were *imposed*. Sec. 145(b) provides penalties only for evasion of taxes *imposed by the chapter*. The chapter provides exactly how taxes shall be *imposed* and it does not provide for any "assumptions" by anybody. The method of imposing taxes is explicit, definite and mandatory. The record shows that no taxes were imposed in this case. Section 145(b) was not applicable and the fact "that the sentence was much less than the punishment authorized by Section 145(b)" is irrelevant.

REPLY TO PAGE 4 OF RESPONDENT'S BRIEF IN OPPOSITION WHICH STATES THAT PETITIONER HAS ABANDONED THE ARGUMENT ABOUT THE JURISDICTION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND.

Respondent repeatedly states in his brief in opposition that petitioner has abandoned his argument that as a resident of the District of Columbia petitioner was not subject to indictment and trial in the District Court for the District of Maryland.

This question was important in this case because of the ruling of the Court below in *Bowles* v. *United States*, 72 F. 2d 772, that a resident of the District of Columbia could be prosecuted in a Maryland court on a charge of violation of Section 145(b) of the Internal Revenue Code of 1939.

However, prior to the filing of this appeal petitioner had presented the facts in this case to the Practicing Law Institute, the Treasury Department, and to the Joint Committee on Internal Revenue Taxation to the Committee on Ways and Means and they had presented the facts to the Congress with a recommendation for prompt correction of the error and injustice. The Congress, realizing the injustice of the ruling of the

Court below promptly passed 72 Stat. 512 to correct the error of the Court below; and on August 6, 1958, after petitioner's brief (Appel. Br. 1-34) had been prepared, President Eisenhower approved and signed 72 Stat. 512 correcting the unjust ruling which had been applied by the Court below.

Petitioner, having completely won the point by the action of the Congress, and being thus assured that no other American taxpayer will ever again be subjected to similar embarrassment and injustice (Appel. Br. 13-23) did not include that question in the petition to this Court.

However, respondent has apparently failed to understand the significance of the question, the injustice of that ruling by the Court below, the disastrous effect in this case, and petitioner's reason for abandoning it here. Now, since respondent has repeatedly brought this question to the attention of the Court; petitioner asks the Court to remember that the question was abandoned here because the Congress has already decided that petitioner was entitled to the relief petitioner was asking for and the only question remaining for this Court to consider is the disadvantage and injustice the lower Court's ruling wrought in the Baltimore trial (Appel. Br. 13-34).

The action of the Congress (72 Stat. 512) leaves the main question before this Court. Can the penalties of Sec. 145(b) be applied when all gross income and all expenses have been reported in the returns filed and there has been no examination of the returns to determine the correct amount of the tax (Sec. 57), no determination of any deficiency (Sec. 271), and no assessment, or imposition of any tax as required

by Section 272 of the Code. Can the penalties of Sec. 145(b) be applied on the simple assumptions and charges of an agent who testified that he had made no inquiry about the returns (Pet. 6), no inquiry about the particular items listed as expenses on the returns (Pet. 7), no tabulation of the items expensed (Pet. 7), made no calculation of the items (Pet. 7), and made no computation of the items to determine if there was any basis for any assumptions or charges or for determining that a deficiency in tax did exist (Pet. 7-22).

REPLY TO PAGE 5 OF RESPONDENT'S BRIEF IN OPPOSITION WHICH CITES FIVE CASES; ALL OF WHICH ARE INAPPLICABLE IN THIS CASE.

United States v. *Morgan*, 346 U.S. 502. Morgan pleaded guilty to the charge and was sentenced. Later he complained to the Court that at the trial he was not properly represented by counsel.

> MR. JUSTICE REED said: The papers are labeled as though they sought a common-law writ of Coram Nobis, but the motion indicated that an order voiding the judgment is sought. In behalf of the unfortunates, Federal Courts should act in doing justice if the record makes plain a right to relief.

This Court granted the relief. It should grant the relief in this case on this record. The cases were similar only in the fact that "the record makes plain a right to relief."

Cook v. *United States*, 171 F. 2d 567. Edgar W. Cook was convicted for breaking and entering a Post Office. He was sentenced on April 4, 1945. On January 20, 1948, the District Court entered an order amending the judgment by adding a new paragraph, adding a fine of $1.00.

The facts in the *Cook* case are not at all applicable here. This sentence was imposed before there was any examination to determine the correct tax, or to determine if any tax was due or owing. There never was any determination of a deficiency in tax and no tax was imposed. There should never have been a prosecution or sentence in this case. The whole proceeding was illegal here.

Fooshee v. *United States*, 203 F. 2d 247. The United States, while insisting that an offense was charged, points out that, for the reasons it states in its brief, Rule 35 is not applicable to defendant because a motion to correct a sentence under Rule 35 *presupposes* a valid sentence and affords a procedure for bringing an improper sentence into conformity with the law.

That case is not at all applicable here. There are no *presuppositions* in Rule 35.

In this case the Court would have to presuppose that some time in the future there might be an examination of the income tax returns which had been filed by this petitioner (Sec. 57); and the Court would have to *presuppose* that at that examination perhaps some of the items listed as expenses on the return might be disallowed, and then the Court would have to *presuppose* that as a result of disallowing some of those listed expense items that a deficiency in tax; as defined by Sec. 271 of the Code, might be determined; and then the Court would have to *presuppose* that some deficiency in tax might be determined, and made final; as provided by Sec. 272 of the Code; and that such deficiency would then be *imposed* and evaded to make the penalties of Sec. 145(b) applicable, and thus make this sentence legal. Rule 35 is a simple ten-word

sentence. No *presuppositions* can make this sentence legal.

Bowles v. *United States*, 73 F. 2d 772. Bowles failed to make an income tax return for the year 1930. Bowles was a resident of the District of Columbia and he appealed the prosecution in the District Court of Maryland. The Court of Appeals for the Fourth Circuit ruled that a resident of the District of Columbia could be tried in the Maryland Court.

The decision of the Court below may not have been unjust to Bowles because Bowles had not reported his income for the year 1930. He was guilty of income tax evasion and was properly convicted. But the ruling of the Court below caused great injustice in this case (Appellate Br. 13-23). Here no tax was evaded. Returns were filed reporting all income and all expenses (Pet. 7-8). This injustice has been called to the attention of the Congress and the Congress has passed 72 Stat. 512, approved August 6, 1958, correcting the error of the Court below and preventing this error of the Court below from ever again bringing a similar injustice to another taxpayer. (See note Pet. 2a). The injustice has been recognized and corrected by the Congress. Please consider these facts and correct the injustice of the error in this case.

The Courts below erred in ruling:

1. No tabulation of the expense items was at all necessary (Pet. 7).
2. No audit of the returns was necessary (Pet. 2a).
3. No precise computation of the tax was necessary (Pet. 3a).

4. It was not necessary to pass upon the claimed deductions before prosecution (Pet. 3a).

5. Jurisdiction in the Maryland Court by the Court below which has since been corrected by Congress (Pet. 2a note).

6. It was not necessary to examine the returns to determine the correct amount of the tax or impose the tax as required by Sec. 145(b).

7. That the testimony of an expert accountant who had examined the books, records and returns and found that no tax was due or owing could not be presented (Pet. 14).

8. That an appeal not filed by a highly touted lawyer (Appel. Br. 1a, 4a) could not be filed (Appel. Br. 20-21).

9. That when 99 34/100% of the listed items were found to be allowable that there is no requirement for an "audit, precise computation, or passing upon "the other 66/100 of one per cent of the items before there can be a criminal prosecution for fraudulent tax evasion under Sec. 145(b) (Pet. 10-14, 2a-3a).

10. When all gross income and all expenses have been reported (Pet. 8), none of the requirements of Sec. 57, 271, 272 complied with, no taxes computed or imposed, due, owing, payable, no deficiency determined or imposed as required by Sec. 145(b); then the Court erred in imposing this sentence (Pet. 1-23, 1a-8a).

This Court has the power to correct the injustice of this sentence. It has frequently used that power in the past.

Patterson v. *Alabama*, 249 U.S. 600:

> "We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review, but to make such disposition of the case as justice requires."

United States v. *Morgan*, 346 U.S. 600:

> "Federal Courts should act in doing justice if the record makes plain a right to relief."

The record before this Court shows that petitioner filed income tax returns in which he reported all gross income (Pet. 7-8), and all expenses (Pet. 8, 2a-3a).

The returns were complete and listed the expenses in minute detail (Pet. 6-8). They listed 30,000 individual items; 29,800 — 99 34/100% of which were allowed without any examination and the other 200 or 66/100 of one per cent of the listed items the agent testified he disallowed without making any examination, inquiry, tabulation, calculation, computation, list, or any attempt to analyze the items (Pet. 6-7).

The District Court ruled that "no tabulation is at all necessary" (Trans. 24-25). The Court below ruled that "there is no requirement for the precise computation and assessment of the tax before there can be a criminal prosecution for fraudulent tax evasion under Sec. 145(b)." And that Court ruled that "no audit" or "passing upon the claimed deductions was necessary" (Pet. 2a-3a).

Both Courts below ruled that no examination or determination of a deficiency was necessary and the District Court ruled that the best, most experienced and capable tax accountant in Baltimore, who had

made a thorough examination of the returns, books and records and had found that no tax was due and owing could not testify to that fact (Pet. 14).

CONCLUSION

The record shows that the sentence was unjust. The petition should be granted.

Respectfully submitted,

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January 12, 1959.